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In the Supreme Court of the United States

FEDERAL POWER COMMISSION, PETITIONER

v.

MOBILE GAS SERVICE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cause on September 7, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 25-46) is reported at 215 F. 2d 883. The pertinent opinion and order of the Federal Power Commission is set out in the Appendix to the Petition in No. 436 at pp. 18-23.[1]

[1] In No. 436, United Gas Pipe Line Company is seeking review of the same judgment of the Court of Appeals for the Third Circuit. The record here is the same as in No. 436, so that our references will be to the record as it appears in that case.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1954 (App. A, *infra*, p. 47). By order of Mr. Justice Burton dated November 29, 1954, the time for filing a petition for a writ of certiorari was extended to and including February 4, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTION PRESENTED

Whether under the Natural Gas Act the Federal Power Commission may accept for filing and permit to become effective a schedule increasing a gas company's rate for the sale for resale of natural gas to an industrial user, pending a hearing as to its reasonableness, where the existing rate is embodied in a contract between the gas company and the purchaser, filed with the Commission as a rate schedule, and the purchaser has not agreed to the increase.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.* are set out in Appendix B, *infra*, pp. 48-51.

STATEMENT

Mobile Gas Service Corporation, an Alabama public utility, contracted, on January 1, 1936, with the predecessor of the present United Gas Pipe Line Company for the purchase of natural gas for resale by Mobile to domestic and industrial users (R. 13, 33, 111-132).[2] In 1941 the contract was amended to

[2] With the enactment of the Natural Gas Act, this contract was filed with the Federal Power Commission as Rate Schedule No. 20 (R. 13).

provide that United should supply Mobile's requirements of gas for industrial resales at a rate of 90% of the proceeds received by Mobile but not less than 16¢ per MFC unless United consented in writing (R. 13, 133-145).[3] In 1946, United agreed with Mobile to reduce its price on a portion of Mobile's industrial resales to Ideal Cement Company to 80% of the proceeds (R. 5, 13-14).[4] About the same time, Mobile contracted for a ten-year period to supply Ideal with natural gas at a fixed rate of 12¢ per MCF (R. 5, 13). Subsequently, in May 1952, United filed with the Commission its Gas Tariff Original Volume No. 1, substituting for the percentage rate provided in the 1946 agreement, the equivalent flat rate of 10.7¢ (R. 5, 14-15).[5] (Mobile's rate to Ideal remained at 12¢ per MCF.)

On June 24, 1953, United filed rate schedules with the Commission, whereby it proposed to increase the rates for a number of its sales to various customers, including Mobile (R. 3, 15, 34). Among these new schedules for sales to Mobile were an increase in the rate for the Ideal resales from 10.7¢ to 14.5¢ per MCF (R. 3, 15, 34). United further requested that the effective date of these new schedules be July 15, 1953 (R. 3, 91), which the Commission, by order dated July 10, 1953, refused to grant

[3] This amendment to the contract was filed with the Commission as Supplement No. 7 to Rate Schedule No. 20 (R. 76-77).

[4] An amendment embodying this contract was filed with the Commission as Supplement No. 10 to Supplement No. 7 (R. 5, 33-34, 77-78).

[5] This was done to comply with the Commission's requirement that all United's rates be converted from a percentage to a dollars and cents basis (R. 34).

(R. 3, 92). Noting that United's increased rates "* * * * have not been shown to be justified and may be unjust and unreasonable or otherwise unlawful" (R. 91), the Commission consolidated the proceeding with other pending proceedings involving United and fixed July 20, 1953, as the date for hearing on the reasonableness of the proposed rates (R. 3, 93). In addition, the Commission suspended until December 25, 1953, all of the increases proposed by United (including those to Mobile) which it was authorized to suspend under Section 4(e) of the Gas Act, *infra*, pp. 49-50 (R. 94). Since, however, rates for sales for industrial resales were not suspendible, the Commission postponed the effective date for the new schedule for the Mobile-Ideal sale until July 25, 1953, the last day of the thirty-day notice period provided in Section 4(d), *infra*, pp. 48-49 (R. 94).

On July 16, 1953, Mobile moved to intervene in the consolidated hearings (R. 16). On August 7, 1953, Mobile, amending its petition previously filed in the consolidated proceedings to invoke a separate proceeding (R. 4, 26-27), requested the Commission: (1) to annul and set aside that part of the July 10 order permitting the filing of the new rate schedules for Mobile-Ideal sales and instead to reject the filing on the ground that the United-Mobile contract cannot be abrogated by United's unilateral action without a hearing and determination by the Commission that the existing rates were unjust and unreasonable; (2) if rejection is denied, to order a separate hearing on the lawfulness of

the higher rates filed by United for the Mobile-Ideal sales; and (3) to direct United to refund to Mobile the difference, if any, between the rates proposed by United and those finally determined by the Commission (R. 10-24).

In denying Mobile's petition, the Commission held first that United's filings could not be rejected because they were made in conformity with the Commission's Regulations and Section 4 of the Gas Act, the only section under which a gas company could initiate a rate increase (R. 5-6). The Commission further ruled that no good cause was shown for a separate hearing; in the Commission's experience, the consolidated hearings, which had already begun, were more practical since the reasonableness of the rate for the Mobile-Ideal sale raised issues common to other rates involved in the consolidated hearings (R. 6-7). Finally, the Commission held that it had no power to order refunds in the case of sales for resale for industrial use, since the rates for such sales are not suspendible under Section 5(e) (R. 7-8).

Upon denial of its petition for rehearing (R. 52-62, 63-64), Mobile sought review in the Court of Appeals for the Third Circuit (R. 65-74). The court below (per McLaughlin, J.) reversed the Commission's order and directed it to reject the filing of United's proposed increases for the Ideal resales, since United's action had been taken before a Commission's determination, made after a hearing, that the existing rates were unjust and unrea-

sonable (App. A, pp. 25-46).[5] Judge Hastie dissented (App. A, p. 46).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that, since United's existing rate for the Mobile-Ideal industrial resale was established in a contract between United and Mobile, the Commission was without authority to permit the rate increase proposed by United to become effective in the absence both of Mobile's consent and of an administrative determination, made after hearing, that the existing rate is unjust and unreasonable. This holding is contrary to the clear and unambiguous language of Section 4(d) and (e) of the Natural Gas Act, *infra* pp. 48-50, and in conflict, at least in principle, with the prior decision of the same Court of Appeals in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, as well as with the recent decision of the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, C.A. 5, No. 15034, decided November 24, 1954. Moreover, apparently influenced by its unwarranted feeling that the Commission's result was inequitable to Mobile, the court has accorded to the United-Mobile contract an unmerited dignity and erroneously character-

[5] In view of this holding, the court did not reach the question (also raised by Mobile) whether, assuming the proposed increase could become effective prior to a determination as to its reasonableness, the Natural Gas Act authorized the Commission to order refunds should the new rate for the industrial resales be found to be unreasonable (App. A, p. 45). Consequently, this question is not involved in the present posture of the case.

ized as "radical" a procedure which has been consistently followed by the Commission in its administration of the Natural Gas Act as well as the Federal Power Act, and is also a recognized technique adopted by many states in their public utility regulatory statutes. Further, the holding below, if not corrected, will result in a substantial increase in the administrative burden on the already overloaded Commission. Review by this Court is therefore clearly justified.

1. (a). The court below has failed to distinguish between the two separate and distinct rate procedures provided in Sections 4(d), 4(e), and 5(a) of the Natural Gas Act—"the heart of the new regulatory system" (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 611). Sections 4(d) and (e), *infra*, pp. 48-50, set out the so-called "filed rate" procedure, which is applicable when a natural gas company itself initiates rate changes,[7] and, on the other hand, Section 5(a), *infra*, pp. 50-51, provides the governing procedure for rate changes initiated by someone other than the natural gas company.[8] Under Sections 4(d)

[7] The rate filed by a natural gas company pursuant to Section 4(d) is, upon becoming effective, the legal rate, enforceable in the same way as a Commission determined rate. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, holding (at 251):

> [Petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

[8] Section 5(a) permits the invocation of the procedure there provided upon the Commission's "own motion or upon complaint of any State, municipality, State commission, or gas dis-

and (e), hearings are not mandatory, but if ordered by the Commission, they relate to the reasonableness of the *proposed increase;* Section 5 requires hearings at which the Commission is to consider the reasonableness of the *existing rate.*

Thus, when United filed its proposed increases, the Commission had no choice but to follow, as it did, the procedure prescribed in Sections 4(d) and 4(e). As authorized by Section 4(d), the Commission refused to permit the proposed rate increases to be effective prior to the expiration of the thirty-day notice period, and, on its own initiative, it "enter[ed] upon a hearing concerning the lawfulness of such rate, charge, classification, or service" (Section 4(e), *infra*, p. 49; see *supra*, pp. 3-4). In addition, "pending such hearing and the decision thereon," the Commission suspended the operation

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tributing company * * *," *infra*, p. 51. Natural gas companies are significantly omitted from this enumeration.

In this connection, it may be noted that the scheme evolved by the court below would, if adhered to literally, preclude all rate increases. For the court in effect denied that rates may be increased under Sections 4(d) and (e). And there can be no rate increases under Section 5(a) if the gas company's filing is rejected since that Section expressly prohibits the Commission from ordering "any increase in any rate * * * unless such increase is in accordance with a new schedule filed by such natural gas company." See *infra*, p. 51. Since the gas companies would thereby be unable to recover increased legitimate costs from customers under contract, they may be forced to try to recover these costs from subsequent customers. The result could well be discrimination against new customers in favor of those who had signed contracts at an earlier date. On the other hand, if the Commission should refuse to permit the discrimination, as expressly forbidden under Section 4(b), then the gas company would be required to absorb all increases in costs, and confiscation might result.

of those new schedules which were suspendible for five months beyond the date they would otherwise be effective (Section 4(e) *infra*, p. 49; see *supra*, p. 4); but since the suspension of "the rate * * * for the sale of natural gas for resale for industrial use only" is expressly prohibited by Section 4(e), the Commission was powerless to prevent the proposed increase for the Mobile-Ideal sale from becoming effective at the end of the thirty-day notice period.[9]

Nor is the appropriate procedure in any way affected by the circumstance that the rate which the gas company proposes to supersede is embodied in a contract filed with the Commission as a rate schedule and the purchaser has not agreed to the change. There is nothing in Sections 4(d) and 4(e) or Section 5(a) to support any inference that these considerations are relevant in determining whether Sections 4(d) and 4(e), or 5(a) is applicable.[10]

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[9] There is no question—and the court below suggested none—as to the constitutionality of the filed rate procedure under which, without prior hearing, rates may become effective and vary private contract rights. Cf. *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U.S. 109, 112-113 and cases there cited at fn. 4; see also *Sutter Butte Canal Co.* v. *Railroad Commission of California*, 279 U.S. 125, 137-138; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U.S. 372, 375-377.

[10] It is established generally that contract rights are subject to the Natural Gas Act and that no special procedure need be followed because a private contract is involved or affected. See *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A. 5), certiorari denied, 332 U.S. 770; *Watab Paper Co.* v. *Northern Pac. Ry. Co.*, 154 F. 2d 436 (C.A. 8); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (C.A. 6); *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 121 F. 2d 159 (C.A. 8).

On the contrary, the Act allows no such distinction. The first sentence of Section 4(d), *infra*, p. 48, defines that and the succeeding subsection (e) as applying to "any such [11] rate, charge, classification, or service, or * * * any rule, regulation or *contract relating thereto*" (emphasis added).[12] This language is indistinguishable for present purposes

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[11] The "such" refers back to Section 4(c) which provides:

> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all *contracts* which in any manner affect or relate to such rates, charges, classifications, and services. [Emphasis added.]

[12] That Section 4(d) does not impose an *obligation* upon a gas company to initiate rate changes which might be contrary to its contract with the purchasing company is immaterial. The problem concerns the proper action to be taken by the Commission once a gas company has undertaken to initiate such rate changes. As we show in the text, the Commission in such circumstances has no discretion and is required to follow the procedure set out in Sections 4(d) and (e). In addition, it may be noted that it is well recognized that "[o]ne of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions * * *." *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light and Power Co.*, 184 F. 2d 552, 567 (C.A. 4), certiorari denied, 340 U. S. 906; see, also, *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 458-459; *Gibbs* v. *Baltimore Gas Co.*, 130 U.S. 396, 410-411.

from the language of Section 5(a), *infra*, pp. 50-51.[13] Thus, the Act on its face refutes the result below that Section 5(a), rather than the filed rate procedure of Sections 4(d) and 4(e), is applicable to rate increases, proposed by a gas company, solely because of the form of the existing rate or the lack of the purchaser's assent. Cf., *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388, 390-391 (C. A. 5), certiorari denied, 332 U. S. 770.

(b). The holding of the Court of Appeals also ignores the Commission's consistent practice of following the filed rate procedure in circumstances such as are here involved. *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F. P. C. 1044, petition for review dismissed, 170 F. 2d 150 (C. A. 8); *Re Panhandle Eastern Pipe Line Co.*, 9 F. P. C. 443, 444-446; *Re Mississippi River Fuel Corp.*, 2 F. P. C. 170, 175-176, affirmed, 121 F. 2d 159 (C. A. 8); see also *City of Los Angeles* v. *Nevada-California Electric Corp.*, 2 F. P. C. 104, 108-109; and *Pacific Gas and Electric Company*, F. P. C. Docket

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[13] Section 5(a) provides in pertinent part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or *contract affecting such rate, charge, or classification* is unjust, unreasonable, unduly discriminatory, or preferential . . . [Emphasis added.]

No. E-6482, order issued June 17, 1954, pending on petition for review, *sub nom. Sierra Pacific Power Co. v. Federal Power Commission*, C. A. D. C. No. 12430 (both applying the similar filed rate provision contained in Section 205 of the Federal Power Act). This consistent practice is, under well established principles, entitled to considerable weight. See, *e. g., United States v. Public Utilities Commission of California*, 345 U. S. 295, 315; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315.

Furthermore, the result below disregards the Act's legislative history which reveals that even prior to the Act's passage the Commission construed the substantially similar provisions of a predecessor bill as permitting a gas company to initiate rate increases without Commission hearing and the Commission's General Solicitor so apprized Congress. See Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess., pp. 28-29.[14]

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[14] MR. LEA: Mr. DeVane, under what conditions would rates be put into effect? That is, what would be the procedure? MR. DEVANE: In the beginning? MR. LEA: Yes. MR. DEVANE: The companies will simply file their schedules. MR. LEA: And those schedules would prevail unless the Commission saw fit to after a hearing and notice, establish a rate? MR. DEVANE: Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing are the rates that will continue in effect until they are changed either by the company as provided in section 4, or by the Commission after hearing. . . . MR. COOPER: And anyone who wants to file a complaint goes to the Commission; is that right? MR. DEVANE: That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4(d). After they have filed them with the Commission and an-

(c). In characterizing the Commission's reading as being of "a radical nature" (App. A, *infra*, p. 45), the court below overlooked the fact that the filed rate procedure provided in Sections 4(d) and (e) is in large measure modeled upon comparable provisions of the Interstate Commerce Act, 49 U. S. C. 15(7). *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806-807 (C. A. 4); cf. *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S. D. Ga.), affirmed, 239 Fed. 718 (C. A. 5); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va.—three judge court); see also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370. In addition, there are numerous decisions revealing similar interpretations of analogous provisions of state public utility regulatory statutes which make widespread use of the filed rate procedure. See, *e. g.*, *Harrison Electric Co.* v. *Citizens Ice & Storage Co.*, 149 Ark. 502, 506-507; *Denver & South Platte Railway Co.* v. *City of Englewood*, 62 Colo. 229, writ of error dismissed, 248 U. S. 294; *Antioch Milling Co.* v. *Public Service Co. of Northern Illinois*, Ill. Sup. Ct. (Docket No. 33254-Agenda 34-September, 1954); *Kansas City Light & Power Co.* v. *Midland*

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nounced those new rates, the Commission has the power to suspend and investigate, and the suspending power extends for a period of 5 months.

In this connection, it may be noted that the legislative excerpt quoted by the court below (App. A, pp. 39-40) does not treat with the instant situation, but rather with a contemplated complaint by a state utility commission as to the reasonableness of existing rates, a situation in which Section 5(a) is applicable. See, *supra*, pp. 7-8.

Realty Co., 338 Mo. 1141, affirmed, 300 U. S. 109; *Public Service Commission* v. *Pavilion Natural Gas Co.*, 232 N. Y. 146; *North Hempstead* v. *Public Service Corporation*, 231 N. Y. 447; *Public Service Commission* v. *Iroquois Natural Gas Co.*, 171 NYS 379, affirmed by memorandum opinion 226 N.Y. 580; *Suburban Water Co.* v. *Oakmont Borough*, 268 Pa. 243.

In each of these cases, the purchaser complained, as does Mobile here, that since the existing rate was embodied in a contract, the increases by the utility company could not be operative prior to a determination of reasonableness by the regulatory commission, and in each instance the highest court of the state rejected the contention. As stated by the Arkansas Supreme Court more than thirty years ago, in *Harrison Electric Co.* v. *Citizens Ice & Storage Co.*, *supra*, at 506-507:

> * * * Nor does the statute require an affirmative order of the commission authorizing that the new rates be put into effect. The rates become effective upon the maturity of the period of thirty days specified in the schedule, unless there is an order of the commission suspending the rates pending a hearing.
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> * * * * * *
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> We are of the opinion, therefore, that the schedule of increased rates promulgated by appellant was valid, and, the statute having been complied with, the new rates superseded any contractual rates theretofore established between the parties. There could be no valid

contract as against the power of public control by the commission. It would not constitute an impairment of the obligation of the contract for the new rates to be put into effect under the control of the Commission.

There is thus "nothing novel in [the] provisions" (App. A, *infra*, p. 41) of Sections 4(d) and (e) as construed by the Commission; instead, as so construed, they contain no more than "the usual provisions. * * * such as we find in all regulatory measures enacted by Congress" (App. A, *infra*, pp. 40-41). The reference below (App. A, *infra*, p. 37) to *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, which dealt with an entirely different problem, is plainly inapposite.[15]

(d). The Court of Appeals placed considerable reliance upon *Wichita Railroad* v. *Public Utilities Commission*, 260 U. S. 48, and *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1 (App. A, *infra*, pp. 33-34). But both these cases involved a Kansas statute which—contrary to the statement of the court below (App. A, *infra*, p. 34)—differs in several critical respects from the Natural Gas Act.[16] Significant among these differences are that (1) the Kansas statute specifically prohibited the

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[15] The question in *Niagara Mohawk* was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes.

[16] *Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (C. A. 10), also cited below (App. A, *infra*, p. 39), involved the same Kansas statute.

utility company from changing its rates without the consent of the state commission, and (2) the Kansas statute contained no provision either for rate changes to become effective with or without commission action (compare the Gas Act's Section 4(d)) or for commission control of the changes pending commission action (compare the Gas Act's Section 4(e)). Cf. *Kansas City Light & Power Co.* v. *Midland Realty Co.*, 338 Mo. 1141, 1150-1151, affirmed, 300 U. S. 109. Moreover, in light of this Court's reference in the *Wichita Railroad* case only to Illinois cases in connection with the statement that "[t]his conclusion accords with the construction put upon similar statutes in other States" (260 U. S. at 58), it is significant that in the recent *Antioch Milling Co.*, case, *supra*, p. 13, the Illinois Supreme Court (after describing the present Illinois statute in terms showing it to be similar to the Gas Act) stated:

> This language seems clearly to contemplate that the Commission shall analyze a proposed rate change, and reach a conclusion as to whether it is to be permitted to go into effect without a formal hearing, or whether it is to be suspended until a formal hearing has been had. That this is what the section means is confirmed by the fact that an earlier provision, which unmistakably required the commission to make findings before a rate increase to become effective, has been repealed. * * *

The court below also relied upon *Colorado Interstate Gas Co.* v. *Federal Power Commission*,

142 F. 2d 943, 954 (C. A. 10), affirmed, 324 U. S. 581 (App. A, *infra*, pp. 35-37). However, when read in context, the quoted excerpt has no bearing on the instant problem. When the Tenth Circuit stated in *Colorado Interstate* that "[t]he passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. * * * Such rates and charges could be modified only after an express finding of unreasonableness" (see App. A, *infra*, p. 36), the court had before it a Commission rate order issued after a Section 5(a) proceeding and was concerned only with whether there was substantial evidence to support the Commission's conclusion. The Tenth Circuit did not hold, nor could it have held consistently with the Gas Act, that a hearing must be had in every case where existing contract rates will be affected by proposed rate changes.

2. The holding below also conflicts, at least in principle, with the prior decision of the Third Circuit in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899. In that case, the Commission, without hearing, rejected the filing of the gas company's new rate schedules on the ground that the proposed increases were unwarranted. The Third Circuit in an opinion by Judge Hastie, the dissenting judge in the instant case, reversed the Commission's action, holding (202 F. 2d at 902):

> * * * On the face of Section 4 of the Natural Gas Act * * * it is clear that, Mississippi's proposed tariff changes having been

duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing —a course for which it cannot show even color of statutory authority.

The observation in the opinion below that "the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates" (App. A, *infra*, p. 46) cannot be reconciled with the holding in the *Mississippi* case that that procedure was one "for which it [the Commission] cannot show even color of statutory authority". The Commission cannot simultaneously accept a new rate filing pending a hearing as to reasonableness (as it was held required to do in *Mississippi*), and reject the filing because no hearing has as yet been had (as the ruling below requires it to do).[17]

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[17] The court below purported to distinguish the *Mississippi* case by relying on Commission Regulation 154.85 (18 C. F. R. 154.85) which requires that '*agreements* intended to effect a change or amendment in [an existing] contract may be made only by the execution of a form of service agreement contained in the tariff" (emphasis added) (App. A, *infra*, pp. 43-44). United's June 24, 1953 rate filing was construed by the court to be an "attempt 'to effect a change' in an unexpired contract without 'the execution of a form of service agreement

The result below is also at odds with the views expressed by the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company* (C.A. 5, No. 15034, decided November 24, 1954). (See App. to Brief in Opp. in No. 436.) There a company purchasing natural gas under a contract with United sought an injunction against United's proposed rate increases on grounds virtually identical to those adopted below. While the Fifth Circuit indicated that the holding of the court below supported its affirmance of the denial of an injunction insofar as it required resort to the Commission, not the courts, for relief (App. to Br. in Opp. in No. 436, p. 9a), on the issue of the proper interpretation of the Gas Act, the Fifth Circuit, in flat contradiction to the conclusion below, stated (App. to Br. in Opp. in No. 436, p. 9a):

> * * * the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme.

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contained in the tariff." (App. A, *infra*, p. 44). Therefore, although the gas company had complied with all filing requirements in the *Mississippi* case and its filing could not be rejected, United, according to the court, had not complied with all filing requirements and its filing must be rejected (*ibid.*). But this distinction is based on an erroneous reading of the regulation. Section 154.85 requires that all *agreements* intended to effect a change must be made on a form of service agreement. United's filing on June 24, 1953 clearly was not an *agreement*, as is evident from Mobile's protestations, and therefore there was no need to comply with Section 154.85. There is, then, no distinction between the instant case and the *Mississippi* case; in both, all filing requirements were met.

> So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should * * * restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the court cannot do.

3. Apparently underlying the ruling below is the court's feeling that the result reached by the Commission was inequitable. The court recognized that the rate set in the United-Mobile contract could be increased pursuant to a Commission determination made after hearing, despite the resulting "squeeze" on Mobile. However, it seemed to feel that in view of Section 4(e)'s express prohibition against suspension of rates for sales for industrial resale, it would be unfair to Mobile to permit the increase to be operative during the pendency of the Commission hearing, particularly if the Commission should ultimately determine that the proposed increase was unjustified.

This inequity may, however, be more fanciful than real. As far as we have been able to ascertain, Mobile has not made any effort to eliminate, or even alleviate, the "squeeze" by seeking an increase in its rate to Ideal either before the state regulatory agency or otherwise—a "squeeze" which, it may be noted, will persist should the Commission approve the proposed increase as it concededly has the power to do. Moreover, while Mobile may lose on its Ideal resale, that loss may, in substantial measure, be offset by the fact that United's proposed in-

creases on its other sales to Mobile were suspended by the Commission for the five months authorized by Section 4(e), with the result that, even should the Commission determine that the increases requested by United were justified in full, Mobile would have been freed from paying the increased rates on the other sales during the period of suspension. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4).

It is such rough balancing that Congress apparently had in mind in prohibiting the suspension of sales for resale for industrial uses. When a gas company files proposed increased rates, the Commission makes a preliminary determination whether to permit the increases to be effective without hearing or to enter upon a hearing. Should it decide upon a hearing, the problem then arises as to what rates should prevail during the pendency of the hearings. Continuance of the old rates would be inequitable to the gas company if the Commission finally concluded that the proposed increases were justified. Permitting the new rate to be effective during the administrative hearing would, however, be unfair to the purchaser if the increases are rejected. Because of the time needed to pass upon new rates, such losses constitute a "necessary incident of rate regulation" (*Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 809 (C.A. 4)). But in order to establish some equitable allocation of these possible losses between the gas company and its purchasers, Congress provided in Section 4(e), on the one hand, that rates for sales for resale other than for industrial use

may be suspended for five months and then be effective under bond subject to refund, and, on the other hand, that rates for industrial resales should not be subject to suspension at all.

While it may be that the delays inherent in processing the heavy volume of proposed rate increases have resulted in imposing an undue burden on purchasers of natural gas for industrial resales, the defect in the Act is one which "must be cured, if at all, by the Legislature." *Public Service Commission* v. *Iroquois Natural Gas Co.*, 171 N.Y.S. 379, 381, affirmed by memorandum opinion, 226 N.Y. 580.[18] The Commission, for its part, has for at least

[18] In the *Iroquois Natural Gas* case, which involved precisely this problem, the New York court stated (171 N.Y.S. at 381):

> * * * under the statutes as they now stand it is the right of the gas company to increase its rates and make the increase effective 30 days after filing with the Commission its schedule of new rates. If complaint is filed with the Commission against the proposed increase, and if the Commission itself sees fit to act without complaint, then a proceeding may be started before the Public Service Commission which will result in an investigation of the propriety of the proposed increase; the Gas Company having notice and the right to be heard, and when a decision is reached, if the new rate is found excessive, it will be annulled or modified according to the decision of the Commission, but this decision may not take place until some time after the new rates have gone into effect. This is the method, and the only method, provided by statute for protecting consumers and municipalities against increases in rates by gas companies. It may be that there is a defect in the statute, and that the Public Service Commission should have power to suspend or postpone the taking effect of proposed rate increases upon complaint made, or even upon its own motion, until a proper investigation can be had. If there is such a defect, it must be cured, if at all, by the Legislature. We must take the statutes as we find them.

the past several years urged Congress to delete the prohibition against suspension of rates for sales for industrial resales. See *e.g.*, Annual Reports of the Federal Power Commission for 1951, 1952, and 1953, at pp. 144, 152 and 154, respectively.

4. The issue decided by the court below is one of importance in the administration of the Natural Gas Act and, in addition, of the Federal Power Act.[19] As shown above, the holding, if permitted to stand, will jeopardize the filed rate procedure enacted in both the Natural Gas Act and the Federal Power Act and consistently administered by the Commission over a period of many years. The regulation in the public interest of rates for natural gas and electricity would be retarded, for the court below would require that all rate increase proposals which involve existing contracts would be subservient to the actions of the parties to the contract.

Indeed, the Third Circuit's opinion may very well require the Commission to enter upon a hearing as to the reasonableness of the existing contract rate, service agreement, or contract affecting a rate, before accepting any rate increase for filing. Prior to the ruling below, it was the Commission's practice, consistent with its reading of the Gas and Power Acts, to hold hearings only when its prelimi-

[19] Sections 205 and 206 of the Power Act (16 U.S.C. 824d, 824e) are substantially the same as Sections 4 and 5 of the Gas Act except that the Power Act does not preclude suspension of rates for sales for industrial resale. A related issue under the Power Act is now pending before the Court of Appeals for the District of Columbia Circuit. *Sierra Pacific Power Co. v. Federal Power Commission*, C.A. D.C. No. 12430 (argued January 12, 1955).

nary study of the proposed increase indicated that need; even with the number of hearings so limited, the heavy volume of rate increase proposals resulted in a substantial delay between the filing and the Commission's final disposition of the requested increase. The many additional hearings probably required by the holding below would further increase the administrative load of the already overburdened Commission [20] and result in even more delay in Commission action on rate increases needed by the gas companies to offset constantly rising costs. The Commission would be compelled to enter upon such additional hearings, although this practice could be without warrant in the Natural Gas Act and its legislative history, as well as contrary to long continued administration of the Act and entirely at odds with established rate regulatory practice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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JANUARY, 1955.

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[20] The Commission's already heavy administrative burden has recently been further ~~argumented~~ augmented as a result of this Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U.S. 672.